HO KAM WAH v. BEGAN LAND SDN BHD

HIGH COURT MALAYA, SHAH ALAM
SM KOMATHY SUPPIAH J
[ORIGINATING SUMMONS NO: 24NCVC-473-06-2020]
24 MAY 2021

CIVIL PROCEDURE: *Judgments and orders – Consent order – Application to set aside consent order – Consent order encompassed settlement agreement – Whether consent order breached – Whether other party entitled to terminate consent order – Whether time expressed as of essence to consent order – Whether party in breach had not performed obligations in its entirety within time frame stipulated by consent order – Whether there was total failure of consideration*

The plaintiff applied to terminate a consent order that she entered into with the defendant in another suit at the Shah Alam High Court ('Suit 627'). The terms of the consent order imposed obligations on both the plaintiff where the defendant was required to construct and transfer nine housing units to the plaintiff while the latter was to transfer a piece of land to the former. The defendant obtained an order in Suit 627 to, *inter alia*, compel the plaintiff to select the nine housing units she was entitled to under the consent order, on account of her refusal to do so. The plaintiff then instituted a fresh action to set aside the consent order but failed in the High Court and the Court of Appeal. The defendant was later informed that the nine housing units were ready to be delivered and enclosed the relevant certificates of practical completion for the units and required the plaintiff to comply with her obligations under the consent order. The plaintiff did not respond. The defendant filed for the enforcement of the consent order ('encl. 128') which was stayed pending the disposal of this action. The plaintiff's contention in this action was that (i) she was entitled to terminate the consent order as the defendant had breached the same in failing to: (a) obtain the relevant certificates of completion and compliance; (b) develop the land in accordance with the approved plans; and (c) failing to deliver the units within 36 months from the date of the consent order; (ii) the consent order was equivalent to a contract and the party not in default could terminate it for breach where the breach committed by the party in default was serious or fundamental; (iii) the breach committed by the defendant amounted to repudiatory breaches and, by reason of s. 40 of the Contracts Act 1950, she was entitled to terminate the consent order; (iv) as the consent order carried no provisions on the consequences of the breach, it did not preclude her, as the innocent party, to elect to terminate the same; and (v) in the event she was unable to secure the primary relief for termination of the consent order, the plaintiff should be permitted to proceed with her alternative relief to levy execution on the consent order. When faced with the objection by the defendant's

counsel that the correct mode of enforcing a consent order was to file an application in Suit 627, the plaintiff then applied for the alternative prayer to be transferred to the Shah Alam High Court for it to be heard together with encl. 128.

Held (dismissing application):

(1) The Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* ('*Berjaya Times Square*') had decided that a party could seek termination only in a case where time is of the essence and the party in breach had not performed its obligations in its entirety within the time frame stipulated by the contract or where there is a total failure of consideration. Applying that principle here, this was not a case of total failure of consideration and nor was time expressed to be of the essence of the consent order. Neither had the defendant refused to perform its contractual obligations or failed to perform its entire promise. It would follow that the plaintiff was not entitled to terminate the consent order as the defendant had not refused to perform its contractual obligations. The plaintiff's submission that she was entitled to terminate the consent order was entirely foreclosed by the decision of *Berjaya Times Square* which was binding upon this court. (paras 30-31)

(2) The consequential relief that the plaintiff sought in the event the termination was allowed was for an order that the defendant accounts for or refunds all benefits that the latter had received under the consent order and damages to be assessed. It appeared that the plaintiff was seeking for restitution and for the consent order to be set aside *ab initio*. This was contrary to the decision in *Berjaya Times Square* and *Turf Club Auto Emporium Pte Ltd And Others v. Yeo Boong Hua* that a contract or consent order could not be discharged or terminated *ab initio* on the basis of a breach. In these two cases, the courts have been unanimous in deciding that a consent order could only be terminated prospectively and its effect was to release parties from future performance. (paras 32 & 33)

(3) The advantage of embodying the terms of settlement in a consent order is that it may be automatically enforced in the event of non-compliance in the same action in the same way as any judgment or order of court. It obviates the necessity for the innocent party to institute a fresh action to compel compliance with the consent order. The plaintiff ought to have applied under the liberty to apply to enforce her rights under the consent order in Suit 627 for an appropriate consequential order in the event she conceived there was a breach of its terms. As its application for enforcement in Suit 627 was filed first in time and was pending, it was more expeditious for the plaintiff to make the necessary application

in that suit as well. Therefore, the plaintiff's alternative relief for enforcement of the consent order was struck out with liberty to enable the plaintiff to make the necessary application in Suit 627. (para 34)

Case(s) referred to:
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Leong Ah Weng v. Neoh Thean Soo & Anor [1983] 2 CLJ 5; [1983] CLJ (Rep) 227 FC ***(refd)***
Mageaswaran Veerapathiran v. Pengerusi Dan Ahli Jawatankuasa Mini Estet Risda Mukim Ampang Tinggi Dan Purun, Kuala Pilah, Negeri Sembilan & Ors [2018] 1 LNS 1205 HC ***(refd)***
Turf Club Auto Emporium Pte Ltd And Others v. Yeo Boong Hua And Others [2017] 2 SLR 12 ***(refd)***
Yeo Boong Hua And Others v. Turf Club Auto Emporium Pte Ltd And Others [2015] SGHC 207 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 40, 56

For the plaintiff - Foo Joon Ling & Chew Zen Tao; M/s Gan Partnership
For the defendant - Justin Voon; M/s Justin Voon Choi & Wing

Reported by Lina E

JUDGMENT

SM Komathy Suppiah J:

Introduction

[1] Can a consent order which encompasses a settlement agreement arrived at between parties, be terminated for breach. That question lies at the heart of these proceedings begun by originating summons.

[2] The plaintiff, Ho Kam Wah @ Ho Kim Wah, has applied in this action, to terminate a consent order dated 28 June 2016 she entered into with the defendant, Began Land Sdn Bhd, in another suit, Shah Alam Civil Action No: 22NCVC-627-11-2015 ("Suit 627"). The precise orders the plaintiff seeks are:

(i) A declaration that the consent order dated 28 June 2016 entered into between the plaintiff and the defendant in the Shah Alam High Court Suit No. 22NCVC-627-11-2015 stands terminated, and consequent upon such termination:

  (a) The defendant shall account for or refund all benefits that the defendant has received under or pursuant to the consent order within 30 days from the date of this order; and

  (b) damages to be assessed by this Honourable Court and be paid by the defendant to the plaintiff; or

A (ii) in the alternative to the Prayer (i) above:

(a) the defendant shall complete development of the piece of land held under title No. Geran 47974, Lot No. 2890 (now known as PT 74914 and PT 74915), Mulik Kajang, Daerah Ulu Langat, Negeri Selangor (the "said land") in accordance with the approved B building plans as required under the consent order, and deliver to the plaintiff the plaintiff's entitlement under the consent order within 30 days from the date of this order; and

(b) damages for the defendant's delay in delivery of the plaintiff's C entitlement under the consent order be assessed by this Honourable Court and be paid by the defendant to the plaintiff.

Factual Background

[3] To better understand the gravamen of the plaintiff's case, it is necessary to state some background facts which are not in dispute. D

[4] In November 2015, the plaintiff instituted Suit 627 against the defendant. On 28 June 2016, the parties entered into a consent order to settle the case. The consent order insofar as material provides:

(i) Bahawa defendan akan **memajukan tujuh unit rumah kediaman berkembar 3 tingkat** dengan keluasan tanah sebanyak tiga ribu dua E ratus (3,200) kaki persegi iaitu 40 kaki kali 80 kaki setiap satu dengan kawasan dibina ("built up") seluas kira-kira lima ribu (5,000) kaki persegi berdasarkan pelan-pelan pembinaan yang telah diluluskan ("approved building plans") oleh pihak berkuasa berhubung pembinaan di atas hartanah yang dipegang di bawah hak milik no. F geran 47974 Lot no. 2890 (sekarang dikenali sebagai P.T. 74914 dan P.T. 74915) Mukim Kajang, Daerah Ulu Langat, Negeri Selangor ("hartanah tersebut") **dalam tempoh 36 bulan dari tarikh perintah ini**;

(ii) Bahawa defendan akan memajukan 2 unit rumah kediaman jenis G rumah bandar ("town houses") di atas lot tanah individu yang sama berkeluasan tanah sebanyak satu ribu lapan ratus (1,800) kaki persegi iaitu 24 kaki kali tujuh puluh lima (75) kaki dengan kawasan dibina ("built up") seluas kira-kira satu ribu (1,000) kaki persegi setiap satu berdasarkan pelan-pelan pembinaan yang telah diluluskan ("approved building plans") oleh pihak berkuasa berhubung H pembangunan di atas hartanah tersebut dalam tempoh 36 bulan dari tarikh perintah ini;

...

(ix) bahawa peguam cara defendan adalah diberi kuasa yang tidak terbatal ("irrevocably authorised") untuk menyerahkan ("deliver") I borang-borang pindah milik (borang 14A Kanun Tanah Negara, 1965) memihak plaintif, surat-suratan ikatan hak milik-hak milik ("original documents of title"), suratan ikatan hak milik strata

("original strata document of title") dan kunci-kunci berhubung unit-unit rumah kediaman berkembar dan rumah kediaman jenis rumah bandar ("town houses") yang dirujuk dalam perenggan (i) dan (ii) di atas apabila **Certificate of Practical Completion untuk bangunan unit-unit rumah kediaman yang dirujuk di perenggan (i) dan (ii) di atas dikeluarkan oleh arkitek** atau pada satu masa yang awal yang dipersetujui di antara pihak plaintiff dan defendan beserta wang sebanyak satu juta (RM1,000,000) yang dirujuk dalam perenggan (vi) di atas kepada peguam cara plaintiff sebagai pemegang amanah ("stakeholders") untuk dimajukan kepada plaintiff dalam masa 21 hari dari tarikh borang pindah milik hartanah Lot 2889 diadjudikasikan dan dikemukakan kepada Pejabat Tanah berkenaan untuk didaftarkan di atas nama defendan atau nomineenya dengan kos dan perbelanjaan berkaitan dibiayai oleh defendan.

...

(xvii) bahawa kedua-dua pihak adalah bebas untuk memohon sebarang perintah lanjut bagi memberi kesan kepada terma-terma perintah persetujuan ini.

(emphasis added)

[5] In a nutshell, under the consent order:

(i) the defendant was required to develop a piece of land in accordance with the approved layout plans by building 70 units of three-storey-semi detached houses and also town houses;

(ii) from this development, the plaintiff was to select seven units of the semi-D houses and two units of town houses ("the nine units"); and

(iii) in return, the plaintiff was to transfer a separate piece of land to the defendant or the nominees elected by the defendant.

[6] Thus, the terms of the consent order imposed obligations on both the plaintiff and the defendant. The defendant is required to construct and transfer the nine units to the plaintiff and the latter to transfer a piece of land to the former.

[7] On 5 March 2018, the defendant obtained an order in Suit 627 to, *inter alia*, compel the plaintiff to select the nine housing units she was entitled to under the consent order, on account of her refusal to do so.

[8] The plaintiff then instituted a fresh action to set aside the consent order. She failed both in the High Court and Court of Appeal.

[9] On 24 February 2020, the defendant's solicitors informed the plaintiff that the nine units are ready to be delivered and enclosed the relevant certificates of practical completion ("CPC") for the units and required the plaintiff to comply with her obligations under the consent order. The plaintiff did not respond.

[10] On 17 March 2020, the defendant solicitors sent another letter to the plaintiff stating that if they did not hear from her by 7 April 2020, the defendant would have no alternative but to commence legal proceedings to enforce the terms of the consent order.

[11] The plaintiff solicitors then responded by stating that the defendant was in breach of the consent order as the nine units ought to have been delivered within 36 months from the date of the said order together with the relevant certificates of completion and compliance ("CCC"). The plaintiff also complained that the town houses had been constructed on barren land without the completion of the remaining buildings thereon in accordance with the approved plans. The defendant would not be able to obtain CCC for these two units on account of its failure to follow the approved plans.

[12] By another letter dated 14 May 2020, the plaintiff's solicitors letter gave notice that the plaintiff would terminate the consent order unless the defendant completed and delivered the units in accordance with the consent order within 14 days.

[13] By letter dated 29 May 2020, the plaintiff's solicitors informed the defendant that the plaintiff was terminating the consent order because of the breaches committed by the defendant. Thereupon, on 12 June 2020, the plaintiff filed the present action to terminate the consent order.

[14] This led to the defendant filing encl. 128 in suit 627 for the enforcement of the consent order. The enforcement application which is pending in Shah Alam Civil High Court 2 has been stayed pending the disposal of the plaintiff's action.

The Parties' Submissions

Case For The Plaintiff

[15] It is the plaintiff's contention that she is entitled to terminate the consent order as the defendant is in breach of the consent order:

(i) in failing to obtain the CCC for all the units (an implied term of the consent order);

(ii) in failing to develop the land in accordance with the approved plans (para. (iii) of the consent order); and

(iii) in failing to deliver the units within 36 months from the date of the consent order (paras (i) and (ii) of the consent order).

[16] It is the plaintiff's contention that a consent order is equivalent to a contract and the party not in default can terminate it for breach where the breach committed by the party in default is serious or fundamental. It is her case that the breaches committed by the defendant at para. [13] amount to

repudiatory breaches, and by reason of s. 40 of the Contracts Act 1950, she is entitled to terminate the consent order. Counsel cites the Singapore High Court and Court of Appeal's decision in *Yeo Boong Hua And Others v. Turf Club Auto Emporium Pte Ltd And Others* [2015] SGHC 207; [2015] 5 SLR 268; and *Turf Club Auto Emporium Pte Ltd And Others v. Yeo Boong Hua And Others* [2017] 2 SLR 12; [2017] SGCA 21 as illustrative of the view that a consent order can be terminated prospectively for breach.

[17] The plaintiff also contends that as the consent order carries no provisions on the consequences of breach, it does not preclude her, as the innocent party in this case, to elect to terminate the same.

[18] Lastly, she argues that in the event she is unable to secure the primary relief for termination of the consent order, the plaintiff should be permitted to proceed with her alternative relief to levy execution on the consent order. When faced with the objection of counsel that the correct mode of enforcing a consent order is to file an application in Suit 627, the plaintiff then applied for the alternative prayer to be transferred to Shah Alam Civil High Court 2 for it to be heard together with the defendant's application (encl. 128) for enforcement of the consent order in Suit 627.

Case For The Defendant

[19] The defendant denies that it is in breach of the consent order. The defendant argues that the allegations made against it at para. [13] are baseless because there are no such obligations imposed on it under the consent order. It is the defendant's case that under the consent order its obligation is to commence construction of the nine units within 36 months from the date of consent order, and vacant possession is to be delivered to the plaintiff upon the issuance of the CPC. Additionally, the defendant argues that its obligation to deliver vacant possession is reciprocal and is conditioned on the plaintiff transferring Lot 2889 to it or its nominees. The defendant argues that the plaintiff cannot allege delay when she has not performed her end of the bargain.

[20] The defendant also denies that the construction of the town houses was not in accordance with the approved plans. The defendant submits that it is entitled to construct the plaintiff units first and to complete the remaining parts of the development at a later date in accordance with the approved plans, and that this would not affect the procurement of the CCC.

[21] In the alternative, the defendant contends that even if it has committed breaches of the consent order as alleged, the plaintiff is not entitled to seek termination in view of ss. 40 and 56 of the Malaysian Contracts Act 1950. The defendant argues that by virtue of these statutory provisions, an innocent party can only seek termination of a consent order in a case where the party in breach has failed to perform the whole or the entirety of his promise. But,

A in the instant case the defendant points out that it has completed construction of all nine units and is ready to deliver vacant possession. In making this submission the defendant relies upon the decision of the Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, [2009] MLJU 982.

B **[22]** In the further alternative, the defendant contends that the parties to a consent order can only seek a remedy that is provided for in the consent judgment. The defendant argues that as the parties here had not provided for termination of the consent order in the event of a breach, the plaintiff cannot now seek termination. In support of this proposition, the defendant relies C strongly on the decision of the Justice Darryl Goon Siew Chye J in *Mageaswaran Veerapathiran v. Pengerusi Dan Ahli Jawatankuasa Mini Estet Risda Mukim Ampang Tinggi Dan Purun, Kuala Pilah, Negeri Sembilan & Ors* [2018] 1 LNS 1205. In that case, His Lordship observed:

> [36] *Uraco Manufacturing* was thus concerned with the enforcement of a D consent order by means of a fresh action. However, unlike *Uraco Manufacturing*, what the plaintiff is seeking in this case is to recover damages for an alleged breach of the consent judgment, a proposition that is very different and discrete from the mere enforcement of a consent order or judgment.
>
> E [37] In this action, I do not see that there is any legal basis for the plaintiffs to seek, effectively, to enforce the consent judgment by mounting this action based on its alleged breach for a remedy that was not within the contemplation of the consent judgment itself. All the more so, as there is no attempt made by the plaintiff in this action to vary the consent judgment. Indeed, from the evidence, F no reason exist that might justify a variation of the consent judgment to produce the remedy sought by the plaintiff, even if a variation is desired. The plaintiff is bound by the terms of the existing consent judgment. He therefore may not, without the consent of the parties, seek to precipitate an outcome that is different from the terms set out in the consent judgment.

G **[23]** The defendant also contends that the correct remedy, where a breach of the consent order is alleged, is for the innocent party to seek enforcement of the consent order under the civil action upon which the consent order was recorded. The defendant submits that the plaintiff ought to have made an H application for enforcement in Suit 627 under the liberty to apply clause instead of bringing a fresh action. The defendant argues that the plaintiff's submission that her alternative prayer be transferred to Shah Alam High Court 2 if she fails to procure a termination of the consent order, is not practical at this late stage of the proceedings.

I

Contracts Act 1950

[24] Before I consider the rival submissions, it is convenient to set out the statutory provisions in the Contracts Act 1950 that the parties rely on:

> Section 40
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.
>
> Section 56(1)
>
> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Right to Terminate Consent Order

[25] The central question here is whether a consent order can be terminated for breach. The parties have cited *Turf Club Auto Emporium Pte Ltd And Others v. Yeo Boong Hua* (*supra*) at para. [16] and *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* at para. [21] that in support of their respective propositions. It is now necessary to consider these authorities in some detail.

[26] The facts in *Turf Club Auto Emporium Pte Ltd And Others v. Yeo Boong Hua* are that the appellants and the respondents had entered into a joint venture to develop a plot of land. As part of the arrangements, the first appellants obtained a head lease from the Singapore Land Authority, and granted corresponding sub-tenancies to the JV companies. The parties eventually fell into disputes and commenced court proceedings against each other. They managed to reach settlement, which was recorded in a consent order. The consent order provided for a bidding exercise between the appellants and the respondents in which, the higher bidder would buy out the lower bidder's shares in the JV companies. During this time, the first appellant had renewed the head lease, but did not inform the respondents or issue sub-tenancies, thus affecting the valuation of the companies. The respondents then applied to set aside the consent order. The High Court found that the appellants had committed repudiatory breaches and set aside the consent order and ordered that the action upon which the consent order was made be reinstated. The defendant appealed.

[27] In setting aside the decision of the trial judge, the Singapore Court of Appeal explained at paras. [148], [149], [151], [152], [153], [155] and [156]:

> For these reasons, we hold that the Defendants (Consolidated Suits) had breached cls. 5 and 11 of the Consent Order and the Implied Term and that all of these breaches were repudiatory in nature. We will refer to

these three breaches as "the Repudiatory Breaches". We turn next to consider whether the Judge was correct to have found that the Consent Order can and should be set aside *ab initio* as a result of the Repudiatory Breaches.

Mr Poon argues that even if the Judge was correct to have found that the Consent Order had been breached and the breaches were repudiatory in nature, he was wrong to set aside the Consent Order on that basis because such breaches would, as a matter of law, only permit a termination of the Consent Order by the Respondents with prospective effect. He submits that the Consolidated Suits cannot be revived because they had effectively been superseded by the Consent Order, which had enshrined the parties' settlement.

We respectfully disagree with the Judge on this issue as we do not see any basis upon which it would be possible to set aside the Consent Order *ab initio* on the basis of the Repudiatory Breaches. As pointed out by Mr Poon, the Respondents must establish a vitiating factor on the facts before the Consent Order, which is contractual in nature, can be declared *void ab initio* … The Respondents have not pointed to any operative vitiating factor. In fact, it is not their case that any such vitiating factor is present. *Where a contractual consent order, such as the present one, is discharged for breach, it is terminated prospectively and the parties are released from future performance.*

Further, as we observed in Indian *Overseas Bank v. Motorcycle Industries (1973) Pte Ltd* [1992] 3 SLR(R) 841 at [13]-[20] ... a settlement agreement which has been entered into for good consideration has the following effects:

(a) It puts an end to the proceedings, which would thereby be spent and exhausted.

(b) It precludes the parties from taking any further steps in the action, except where they have provided in the settlement agreement for liberty to apply, in the same action, for the purpose of enforcing the agreed terms.

(c) It supersedes the original cause of action altogether.

Indeed, as further noted in David Foskett, *Foskett on Compromise* (Sweet & Maxwell, 8th Ed, 2015) ("*Foskett*") at para 8-01 and *Thoday* ([83] *supra*) at 197-198, if a settlement is embodied in a consent judgment, the underlying causes of action are merged in the judgment. New causes of action then arise from the existence of the settlement agreement because the natural inference is that the parties' common intention is that the consent order should thereafter govern their relationship in respect of the disputed matters with which they had been previously engaged.

The only caveat to this would be where the settlement agreement itself permits recourse to the original claim in the event of a breach of its terms. If so, and if a breach is subsequently committed, the innocent party may

then proceed with the original claim (see the observations of the High Court in *The Dilmun Fulmar* [2004] 1 SLR(R) 140 at [7] that an agreement of compromise would discharge all original claims and counterclaims unless it expressly provides for their revival in the event of breach ...

In our judgment, the Consent Order cannot be set aside and the Consolidated Suits cannot be revived notwithstanding the Repudiatory Breaches. It is clear from cl. 1 of the Consent Order that the Consent Order unequivocally and immediately compromised the Consolidated Suits. Clause 1 states as follows:

> The terms of this Order shall constitute a full and final settlement of all claims that the [Respondents] may have against [the Defendants (Consolidated Suits)], howsoever arising out of or in relation to the [Consolidated Suits].

The original causes of action in the Consolidated Suits were superseded upon the making of the Consent Order, and the original claims were discharged by the Consent Order, which did not expressly provide for the revival of the claims in the event of a breach. The clear language of cl. 1 of the Consent Order also militates against an interpretation that the compromise of the Consolidated Suits was conditioned on the parties performing the terms of the Consent Order. *Contrary to the Judge's finding, we are satisfied that the Repudiatory Breaches only had the effect of prospectively terminating the parties' agreement and releasing the parties from future obligations.* We therefore consider that the Judge was wrong to have found that the Consent Order could be set aside on this basis.

(emphasis added)

[28] That brings me now to the facts in *Berjaya Times Square Sdn Bhd* (*supra*). There, the respondent entered into an agreement with appellant developer under the terms of which it was to deliver within on or before 23 November 1998. The agreement also made time the essence. The appellant did not make delivery within the stipulated time, and the respondent brought an action claiming, *inter alia*, a declaration that the agreement had been rescinded and for an order that the appellant refund the monies in its hands. There was also a claim for damages for failure to deliver vacant possession of the subject property on the date of completion. The High Court and Court of Appeal found that the appellant's failure to deliver vacant possession of the lot on 23 November 1998 constituted a fundamental breach of the agreement, and that as time was of the essence of the contract the respondent was entitled to rescind the contract under s. 56 of the Contracts Act 1950. The appellant appealed.

[29] The Federal Court in allowing the appeal held at paras. [12], [13], [24], [26], [27], [35], [44] and [46]:

> The starting point is to recognise that in an action for breach of contract it is the court that determines who is the innocent party and who is the guilty party. That problem does not arise in the present case because the appellant has freely admitted throughout the proceedings that it is the

party that is guilty of having breached the contract. The only issue that remains is whether – as held by the learned trial judge – the respondent as the innocent party is entitled to rescind the contract, that is to say, to have the parties restored to a position where they will stand as if the contract had never been made.

The doctrine of repudiation is based on the proposition that where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. He or she may elect to accept the repudiation, treat the contract as at an end and sue for damages. The rationale is that the primary obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach. See *Moschi v. Lep Air Services Ltd & Anor* [1973] AC 331. Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. Whether the one or the other course was adopted by the promisee – the innocent party – is a fact that is to be inferred by the court from the objective facts, including the words and conduct of the parties. An election once made is irreversible. see *Sargent v. ASL Developments Ltd* (1974) 131 CLR 634 at p 655. But it is the essence of the doctrine of repudiation that the breach must go to the root of the contract ...

...

It is my considered judgment that the position is no different in Malaysia. Section 40 of the Act is a restatement of the English common law position. It provides as follows:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Special attention should be paid to the phrase 'his promise in its entirety'. Under the section the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. *If there is part performance by the defaulting party, the innocent party may not put an end to the contract*.

That brings me to s 56(1) of the Act which provides ...

...

Learned counsel for the respondent submitted that since the subsection employs the phrase 'voidable at the option of the promisee', it differs from the English common law. With respect that submission is without merit ...

In the second place, particular attention must be paid to the wording of the subsection. It says 'fails to do any such thing' within the stipulated time. The words 'any such thing' refer to the promise in its entirety. *In my judgment, s. 56(1) should be read together with s 40 of the Act when determining*

whether a promisor has committed a breach of such a nature that goes to the root of the contract. This is sometimes described as a fundamental breach. In the third place, s 56(1) as is the case with the other provisions of the Act are *ipsissimis verbis* the corresponding provisions of the Indian Contract Act 1872. That Act was drafted at a time in the history of the English common law when decided cases, spoke of the voidability of broken contracts and a right to rescind such contracts. This is what Lord Wilberforce in *Johnson & Anor v. Agnew* referred to as 'the contrary indications' that 'may be disinterred from old authorities'. *In my judgment, the phrase 'becomes voidable at the option of the promisee' in s 56(1) means this: a party not in default has a choice whether to put an end to the contract or signify his or her acquiescence in its continuance when the party in default commits a fundamental breach of contract by not performing his entire promise within the time stipulated by the contract, provided that time is of the essence of the contract*.

...

In my respectful view the High Court in *Chye Fook & Anor v. Teh Teng Seng Realty Sdn Bhd* fell into error in equating the right to terminate for a fundamental breach of contract ie, a breach going to the root of the contract on the one hand with the equitable remedy of rescission on the other. But the decision may nevertheless be supported on its peculiar facts because as may be seen from the judgment, that was a case in which, at the material time the building had not even been constructed. So, as at the date on which the purchaser was to have the house, construction had not even commenced. The actual decision on its facts is therefore supportable as at the material time, the developer had not done any of the things it had promised to do within the time specified by the contract. But in the present case the facts are very different. Here, the construction had commenced and was well on its way. There was a delay in the delivery of vacant possession and for that breach the contract itself provides a remedy – the payment of liquidated damages calculated on the agreed formula. Put simply, this is not a case where there has been a total failure of consideration.

...

Returning to the mainstream, we have here an agreement which contains two clauses. One that provides for the payment of a sum as liquidated damages calculated on a daily basis for the period of delay in making delivery of the premises in question and another that makes time of the essence of the contract. Applying the guidelines discussed earlier, it is my judgment that time is not of the essence of the agreement in this case. A promise to construct and deliver a building within a stipulated time coupled with a promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of the essence. It certainly points to an intention that time was not to be of the essence.

> To summarise, this is a case in which, upon a proper construction of the agreement, time was not of the essence. The respondent was not therefore entitled to terminate or put an end to the contract when the appellant failed to deliver the unit of shop lot on the stipulated date. All that it was entitled to receive was compensation calculated on the agreed basis. Its purported termination of the agreement was therefore wrongful.
>
> (emphasis added)

[30] The Federal Court in *Berjaya Times Square Sdn Bhd* (*supra*) has decided that a party can seek termination only in a case where time is of the essence and the party in breach has not performed its obligations in its entirety within the time frame stipulated by the contract or where there is a total failure of consideration. Applying that principle here, this is not a case of total failure of consideration, and nor is time expressed to be of the essence of the consent order. Neither has the defendant refused to perform its contractual obligations or failed to perform its entire promise. It would follow that the plaintiff is not entitled to terminate the consent order as the defendant has not refused to perform its contractual obligations.

[31] The plaintiff's submission that she is entitled to terminate the consent order is, in my view, entirely foreclosed by the decision of the Federal Court in *Berjaya Times Square Sdn Bhd* which is binding upon this court.

[32] It is also apposite at this juncture to point out that the consequential relief the plaintiff seeks in the event termination is allowed is for an order that the defendant accounts for or refunds all benefits that the latter has received under the consent order and damages to be assessed. It appears that the plaintiff is seeking for restitution and for the consent order to be set aside *ab initio.* This is contrary to the decision of the Federal Court in *Berjaya Times Square Sdn Bhd* and *Turf Club Auto Emporium Pte Ltd And Others v. Yeo Boong Hua* that a contract or consent order cannot be discharged or terminated *ab initio* on the basis of a breach. It is instructive in this connection, to look at what the Federal Court said at para. [15]:

> Some writers continue to use the word rescind in this sense. Professor GH Treitel is one. See Trietel's *Law of Contract* (11th Ed). But this 'rescission' is very different from the specific relief of rescission invented by the Court of Chancery. The right to terminate puts an end to the contract only as to the future. All past rights and duties under the contract remain unaffected. But that is not the case where the equitable remedy of rescission is obtained by a decree from the court or by self-help. An example that illustrates rescission as a self-help remedy is *Car and Universal Finance Co Ltd v. Caldwell* [1965] 1 QB 525. The remedy of rescission has the effect of restoring the parties to the same position as though the contract was never made. In other words, there is *restitutio in integrum*. Where it is impossible to restore the *status quo*

ante, the court may grant equitable compensation as happened in *Longstaff & Anor v. Birtles & Ors* [2001] EWCA Civ 1219, a case of breach of fiduciary duty

[33] It would seem, therefore, on the two cases I have referred to, the courts have been unanimous in deciding that a consent order can only be terminated prospectively and its effect is to release parties from future performance.

[34] I must next deal with the plaintiff's alternative relief for execution of the consent order. It is trite that the advantage of embodying the terms of settlement in a consent order is that it may be automatically enforced in the event of non-compliance in the same action in the same way as any judgment or order of court. It obviates the necessity for the innocent party to institute a fresh action to compel compliance with the consent order. I am in agreement with the defendant that the plaintiff ought to have applied under the liberty to apply to enforce her rights under the consent order in Suit 627 for an appropriate consequential order in the event she conceived there was a breach of its terms. (See *Leong Ah Weng v. Neoh Thean Soo & Anor* [1983] 2 CLJ 5; [1983] CLJ (Rep) 227; [1983] 2 MLJ 119). I am also in agreement with the defendant that as its application for enforcement in Suit 627 was filed first in time, and is pending in Shah Alam High Court 2, it is more expeditious for the plaintiff to make the necessary application in that suit as well. Therefore, the plaintiff's alternative relief for enforcement of the consent order is struck out with liberty to enable the plaintiff to make the necessary application in Suit 627.

Conclusion

[35] For the reasons given, the plaintiff's application for termination of the consent order fails. The plaintiff is at liberty to make the necessary application in Suit 627 to enforce her rights under the consent order. The question of whether the defendant is in breach of the consent order must be determined in Suit 627. I therefore order the plaintiff to pay the defendant costs of RM10,000.